Case No. S252445

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

---

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER,
Plaintiff and Respondent,

v.

CITY OF HAYWARD, et al.
Defendants and Appellants.

---

After a Decision by the Court of Appeal
First Appellate District, Division Three, Case No. A149328

---

# APPLICATION OF AMICUS CURIAE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS AND APPELLANTS CITY OF HAYWARD, ET AL. AND PROPOSED AMICUS CURIAE BRIEF

---


Sue Ann Salmon Evans, SBN 151562
sevans@DWKesq.com
William B. Tunick, SBN 245481
wtunick@DWKesq.com
Jennifer H. Choi, SBN 320199
jchoi@dwkesq.com
Dannis Woliver Kelley
275 Battery Street, Suite 1150
San Francisco, CA 94111
Telephone: (415) 543-4111
Facsimile: (415) 543-4384

Kathryn Meola, SBN 172034
kmeola@csba.org
Michael Ambrose, SBN 274952
mambrose@csba.org
California School Boards Association
3251 Beacon Blvd.
West Sacramento, CA 95691
Telephone: (916) 371-4691
Facsimile: (916) 371-3407

Attorneys for Education Legal Alliance of
The California School Boards Association

**APPLICATION OF AMICUS CURIAE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS AND APPELLANTS CITY OF HAYWARD, ET AL. AND PROPOSED AMICUS CURIAE BRIEF**

TO: THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT

## I. INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), the Education Legal Alliance of the California School Boards Association (Amicus Curiae) respectfully requests permission to file the accompanying amicus curiae brief (Amicus Curiae Brief) in support of Defendants and Appellants City of Hayward, et al. Amicus Curiae will address why the Court of Appeal's decision properly applied the language of the California Public Records Act (CPRA), specifically Government Code section 6253.9, subdivision (b)(2)'s allowance for cost sharing between requester and responding agency where production of an electronic record requires data compilation, extraction, or programming. Amicus Curiae will also address the unique burden faced by education agencies in complying with the CPRA while also protecting student records and information as required by federal and State law.

## II. INTEREST OF AMICUS CURIAE

The California School Boards Association (CSBA) is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local board governance and advocates on behalf of school districts and county offices of education.

As part of CSBA, the Education Legal Alliance (ELA) helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local education agencies. The ELA represents its members by addressing legal issues of statewide concern to school districts. The ELA's activities include joining in litigation where the interests of public education are at stake.

In the instant case, Amicus Curiae represents the interests of its members. While members of the ELA support the goal of transparency underlying the CPRA, school boards and county boards of education face additional burdens in responding to the nearly 25,000 CPRA requests they receive each year. Specifically, these agencies must identify and remove private student information from these records prior to disclosure. This is in addition to the need that any public agency would have to review responsive records for application of any other applicable exemption, for example, protection of public employee privacy.

The Legislature's choice of words in section 6253.9(b)(2), as properly applied by the Court of Appeal, provides education agencies the authority to recover some of the costs of producing electronic records in response to a CPRA request – specifically the costs associated with extraction of protected student information from otherwise disclosable electronic records. If this Court were to accept Respondent's attempt to narrow this language, it would undo the balance of disclosure and burden struck by the Legislature.

## III. AMICUS CURIAE BRIEF WILL ASSIST THE COURT

Amicus Curiae has reviewed the parties' briefs and is familiar with the questions involved in this case and the scope of their presentation. Amicus Curiae believes that its Amicus Curiae Brief will assist the Court in the following key ways: (1) by addressing relevant points of law and arguments not discussed in the briefs of either party; (2) further distinguishing and clarifying the case law relied upon by the parties; (3) illuminating the practical and legal consequences on school districts and county offices of education from any narrowing of the cost sharing provisions of the CPRA.

## IV. CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that the Court accept the accompanying brief for filing in this case.

DATED: May 31, 2019

DANNIS WOLIVER KELLY
SUE ANN SALMON EVANS
WILLIAM B. TUNICK
JENNIFER H. CHOI

By: /s/ William B. Tunick

Attorneys for Education Legal Alliance of
The California School Boards Association

Case No. S252445

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

---

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER,
Plaintiff and Respondent,

v.

CITY OF HAYWARD, et al.
Defendants and Appellants.

---

After a Decision by the Court of Appeal
First Appellate District, Division Three, Case No. A149328

---

# PROPOSED AMICUS BRIEF OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANTS AND APPELLANTS CITY OF HAYWARD, ET AL.

---


Sue Ann Salmon Evans, SBN 151562
sevans@DWKesq.com
William B. Tunick, SBN 245481
wtunick@DWKesq.com
Jennifer H. Choi, SBN 320199
jchoi@dwkesq.com
Dannis Woliver Kelley
275 Battery Street, Suite 1150
San Francisco, CA 94111
Telephone: (415) 543-4111
Facsimile: (415) 543-4384

Kathryn Meola, SBN 172034
kmeola@csba.org
Michael Ambrose, SBN 274952
mambrose@csba.org
California School Boards Association
3251 Beacon Blvd.
West Sacramento, CA 95691
Telephone: (916) 371-4691
Facsimile: (916) 371-3407

Attorneys for Education Legal Alliance of
The California School Boards Association

## TABLE OF CONTENTS

**Page(s)**

## TABLE OF AUTHORITIES

**Page(s)**

**State Cases**

**Federal Cases**



**State Statutes**



**Federal Statutes**

**Regulations**



**California Constitutional Provisions**

**PROPOSED AMICUS BRIEF OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANTS AND APPELLANTS CITY OF HAYWARD, ET AL.**

COMES NOW Amicus Curiae, the Education Legal Alliance of the California School Boards Association, to offer the following argument regarding the above captioned matter. The Education Legal Alliance of the California School Boards Association (Amicus Curiae) submits this amicus curiae brief in support of Appellants City of Hayward, et al., pursuant to California Rules of Court, rule 8.520 (Amicus Curiae Brief). As part of California School Boards Association (CSBA), the Education Legal Alliance (ELA) helps to ensure that local school boards and county boards of education[1] retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local education agencies. By submitting this Amicus Curiae Brief, the ELA asserts its vital interest in the outcome of this matter and in this Court's review of the issues raised by this action.

[1] The arguments raised throughout this brief apply equally to school districts and county offices of education even where the brief refers only to school districts for brevity.

## I. INTRODUCTION

Students are at the center of everything that happens at a school district or county office of education. Therefore it is not surprising that almost all records prepared, owned, used, or retained by these education agencies include references to students. Those references and other information in education agency records which could be linked to an identifiable student are strictly protected from disclosure by federal and State law.

This fact places the 1,000-plus education agencies throughout the State in a unique position when responding to records requests under the California Public Records Act (CPRA). While these agencies must review records responsive to such requests to determine if they fall within the exemptions specifically listed in the CPRA, including those which protect the privacy of public employees, they are also required to take the extra step to determine if the records contain references to, or information regarding, students which must be redacted from the records before they are disclosed. Compared to other public agencies, this requirement places a unique additional burden on education agencies responding to CPRA requests – especially as the large majority of education agencies have moved to electronic student information systems.

Under an open records statutory scheme like the CPRA, all requests will impose some financial burden on the responding agency. In the case of

education agencies, this burden can be substantial given the need to review records and remove student information when responding to the approximately 25,000 CPRA requests they receive each year. Ultimately it is left to the law-making body to decide how the costs of responding to requests are shared between the requester and responding agency.

For purposes of the CPRA, the Legislature has directed how these costs should be shared. Government Code section 6253, subdivision (b)[2] indicates that as to hard copy records a requester may be required to pay the "direct costs of duplication." While section 6253.9, subdivision (b), the provision at issue in this matter, outlines the circumstances in which a requester may be required to share some of the costs for obtaining copies of electronic records. While costs for locating records is one borne completely by the agency, under section 6253.9, a requester may be asked to share the cost related to "data compilation, extraction, or programming to produce the record." (§ 6253.9, subd. (b)(2).) While the Constitution may speak to the disclosability of records, it is these statutes that represent the Legislature balancing of public access to records and the need to mitigate some of the financial burden that responding to CPRA requests can impose on agencies.

[2] All statutory references are to the Government Code unless otherwise noted.

In its opinion below, the Court of Appeal held that section 6253.9(b)(2) allowed a responding agency to require the requester to share the costs of extracting exempt material from video records in order to produce a copy for the requester. (*National Lawyers Guild v. City of Hayward* (2018) 27 Cal.App.5th 937, rev. granted Dec. 19, 2018.) Respondent disagrees with this conclusion, arguing for a much more limited application of section 6253.9(b)(2) which would conflate the multiple terms used by the statute and disregard the policy decision made by the Legislature regarding cost sharing.

While not all education agencies maintain police forces (and therefore are likely to hold the type of records at issue in this case) the constricted interpretation urged by Respondent would have a significant impact on all education agencies. It would alter the Legislature's judgment as to the sharing of costs between requesters and responding agencies with regard to electronic records. For education agencies that are required to extract student information from electronic records prior to disclosure, such a change would only increase their financial burden.

For these reasons the ELA submits this brief to highlight the unique impacts a change in section 6253.9(b)(2) would have on education agencies and respectfully requests that this Court affirm the Court of Appeal's conclusion.

## A. FACTS AND PROCEDURAL HISTORY

Amicus Curiae hereby adopts and incorporates by reference the factual background and procedural history set forth in the "Statement of Facts" at pages 8-19 of Appellants' Answer Brief on the Merits.

## B. ISSUE PRESENTED

This case presents the following issue: Does the text of the CPRA only allow an agency to require a requester to share the costs associated with disclosure of electronic records where the agency uses a complex computer process to create a new record consisting of information removed from an existing electronic record or does it allow for cost sharing where the agency is required to conduct any type of extraction, including redaction of private student information, to produce the electronic record?

# II. ARGUMENT

## A. EDUCATION AGENCIES MUST PROTECT STUDENT INFORMATION WHILE COMPLYING WITH THE CALIFORNIA PUBLIC RECORDS ACT

The question presented by this case is significant to school districts and county offices of education[3] that are tasked with complying with the disclosure requirements of the CPRA while also complying with federal and State law protections for records regarding students. Where the CPRA

[3] While not members of the ELA, the holding of this case is also significant to other public agencies that provide education in California including community college districts and charter schools.

favors disclosure of records, including those held by education agencies, the confidentiality of student information is strictly protected. Education agencies must balance these two legal requirements when responding to CPRA requests for electronic records that, as almost all education agency records do, include information about students that must be extracted from the records before they are disclosed.

### 1. Disclosure Requirement Under The California Public Records Act

The CPRA plays an important role in opening government to those it serves. As this Court has repeated on several occasions: "Openness in government is essential to the functioning of a democracy." (*International Federation of Professional & Technical Engineers, Local 21, AFL–CIO v. Superior Court* (2007) 42 Cal.4th 319, 328.) The breadth of the CPRA reflects its purpose:

> "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government records. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*International Federation of Professional & Technical Engineers, Local 21, AFL–CIO v. Superior Court* (2007) 42 Cal.4th 319, 328–329 [].)

(*Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 237.) The CPRA, along with the Ralph M. Brown Act and the California Political Reform Act, provides a window into the

interworking of government to allow members of the public to both scrutinize and understand the decisions made by those who represent them.

At the same time, the CPRA does not operate in a vacuum. "The right of access to public records under the CPRA is not absolute." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282.) The goals of the CPRA can, and do, come into conflict with other "equally important" policy goals, including allowing for deliberation of decisionmakers (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1329) and ensuring the efficient operation of local agencies (*Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 235). Where these tensions arise, the Legislature is entrusted to make the decision as to where to "draw the line" to balance these competing policy concerns.

As to this point, Respondent suggests that the constitutional amendments made by Proposition 59 should be used by the Court to reweigh the balances drawn by the Legislature and resolve any questions about the application of the CPRA in favor of requesters – including the instant question. (Respondent's Reply [Reply], p. 11.) Clearly such an absolute position is untenable, as it would ultimately eliminate any exemptions or limitations on disclosure contained in the text of the CPRA.

While this Court has used the constitutional language as a guide in interpreting whether records are subject to or exempt from disclosure under the CPRA (see e.g. *Sierra Club v. Superior Court of Orange County* (2013)

57 Cal.4th 157, 166-67), Respondent does not cite any examples where the constitutional language has been used to interpret provisions of the CPRA which go beyond whether records are subject to or exempt from disclosure, specifically as to sharing of costs between the requester and responding agency. Rather, in this case, the analysis appropriately focuses on the text of the CPRA as adopted by the Legislature.

### 2. Protection Of Student Privacy Under Federal & State Law Overrides The California Public Records Act

While Respondent focuses on the provisions of article I, section 3 which relate to the disclosure of public records, education agencies also take heed of the provisions of that same article which protect individuals' fundamental right to privacy. (Cal. Const. art. I, § 1.) Mirroring this basic constitutional protection are comprehensive statutory and regulatory schemes specifically intended to protect the privacy of the students. California courts have explicitly recognized that these federal and State law provisions "prevail" over the CPRA's disclosure requirement when the two conflict. (*BRV v. Superior Court* (2006) 143 Cal.App.4th 742, 751.)

Under both federal and State law, education agencies have an obligation to protect information pertaining to students. At the federal level, student privacy is a critical component of the Family Educational Rights and Privacy Act (FERPA), enacted in 1974. Speaking to a legislative conference after the amendment's passage, New York Senator

James Buckley, who authored the bill, explained: "More fundamentally, my initiation of this legislation rests on my belief that the protection of individual privacy is essential to the continued existence of a free society." (121 Cong. Rec. 13,991 statement of Sen. Buckley].) Generally, FERPA prohibits the release of "education records" or "personally identifiable information contained therein" without written consent. (20 U.S.C. § 1232g, subd. (b)(1).)

Congress "effectuated" FERPA's "explicit purpose" of protecting students' right to privacy by imposing funding conditions on educational institutions. (*United States v. Miami University* (6th Cir. 2002) 294 F.3d 797, 817-18.) "Once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent." (*Id*. at p. 810; see also *Disability Law Center of Alaska, Inc. v. Anchorage School District* (9th Cir. 2009) 581 F.3d 936, 939 [noting that FERPA and the Individuals with Disabilities Education Act (IDEA) "prohibit" institutions from disclosing records "without parental consent or court order"].) For purposes of FERPA, "education records" means "records, files, documents, and other materials" that "contain information directly related to a student; and are maintained" by the school district, or

by a person acting for the school district.[4] (20 U.S.C. § 1232g, subd. (a)(4)(A).)

The protections of FERPA are mirrored in California law. Education Code section 49076 states that: "A school district shall not permit access to pupil records to a person without written parental consent or under judicial order…." (Ed. Code, § 49076, subd. (a).) Under California law, a "pupil record" is defined similarly to "educational records:"

> Any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm, or other means. A "pupil record" does not include informal notes requested for a pupil compiled by a school officer or employee that remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute.

[4] Regulations promulgated to implement FERPA also protect "personally identifiable information," which includes, but is not limited to: the student's name; the name of the student's parent or other family member; the address of the student or student's family; a personal identifier, such as the student's social security number or student number; other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; other information that, alone or in combination with, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have a personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or, information requested by a person who the education agency or institution reasonably believes knows the identity of the student to whom the education record relates. (34 C.F.R. § 99.3.)

(Ed. Code, § 49061, subd. (b).) Further, the Education Code, like FERPA, also acknowledges that information that may identify a student should be protected. This includes information that may identify a student on its own, or in combination with other publically available information.

> (2) A ... person or party who has received pupil records, or information from pupil records, may release the records or information … without the consent …, if the records or information are de-identified, which requires the removal of all personally identifiable information, if the disclosing local educational agency or other person or party has made a reasonable determination that a pupil's identity is not personally identifiable, whether through single or multiple releases, and has taken into account other pertinent reasonably available information

(Ed. Code, § 49076, subd. (c)(2).)

These protections for student privacy are incorporated into the CPRA in two ways. First, the CPRA's exemption for "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" (§ 6254, subd. (c)) protects disclosure of private student records. (*Los Angeles Unified School District, supra,* 228 Cal.App.4th at p. 239.)More specifically, the CPRA also incorporates the provisions of FERPA and the Education Code into the types of information and records that are exempt from the CPRA's disclosure requirements. (See §§ 6254, subd. (k), 6276.36, & 6286.42.)

## B. PROTECTION OF STUDENT INFORMATION IMPOSES AN UNIQUE & SUBSTANTIAL FINANCIAL BURDEN ON EDUCATION AGENCIES WHEN RESPONDING TO CPRA REQUESTS

For education agencies, the State and federal protections for student records and information means that when responding to a CPRA request the agency must not only review records to remove records/information that is exempt from disclosure under the general provisions of the CPRA[5], but they must also identify and remove records/information specific to students. Given that students are at the center of all of education agencies' activities these protections, combined with the number and type of CPRA requests that education agencies receive, create a unique and substantial financial burden.

Education agencies have been, and are now more than ever, asked to respond to numerous requests under the CPRA. While education agencies are no longer reimbursed by the State for this mandate, they understand the importance of providing this information to the public and work to respond

[5] As noted above, while this brief focuses on protections around private student information, education agencies are also required to review records responsive to a CPRA request to determine if they are exempt from disclosure under the provisions of the CPRA. This includes reviewing the records to determine if they are: preliminary drafts, notes, or interagency or intra-agency memoranda; records pertaining to pending litigation; personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy; records, the disclosure of which is exempted or prohibited pursuant to federal or state law; or if the public interest in disclosure is clearly outweighed by the public interest in nondisclosure. (§§ 6254 & 6255.)

to such requests while continuing to fulfill their core educational mission. In some cases, the request is straightforward and the records can be readily provided or the agency can help the requester locate the information or records they are seeking. However, in other cases, the requests can be overbroad and create a significant burden. This is especially true as most education agencies now rely on electronic records.

The concern over such burdensome requests is not hypothetical. (See *Crews v. Willows Unified School District* (2013) 217 Cal.App.4th 1368, 1372 [school district spent nearly 200 hours reviewing 60,000 emails responding to underlying CPRA request]; *Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 371 ["overly aggressive, unfocused, and poorly drafted" request which resulted in disclosure of 65,000 pages of potentially relevant records including electronic communications stored by agency].) It is not uncommon for an education agency to receive CPRA requests for *all* communications between several officials for a number of years. Education agencies regularly work with requesters to focus their requests, but such narrowing is not always possible.

While there is no single survey or summary of the number or type of CPRA requests made to education agencies, publically available data suggests that school districts alone receive and respond to nearly 25,000 CPRA requests each year. This estimate is based on information posted

online by media organizations and education agencies themselves.[6] While this information is hardly complete, it does suggest that education agencies, including school districts, must respond to a substantial number of CPRA requests each year.

It is even harder to calculate the staff time and costs associated with responding to these requests. However, information from the same sources cited above suggests that many of these requests are broad requests requiring substantial investment. For example, the Los Angeles Unified School District reported that in 2015 the records responsive to the 661 requests it received occupied 1.5 terabytes of data, the online log kept by the Palo Alto Unified School District suggests that it has identified 1.5 million pages of records responsive to the requests it received since the beginning of 2017, and the San Dieguito Union High School District

[6] The data points supporting this estimate include: https://www.sandiegouniontribune.com/news/watchdog/sdut-search-public-records-requests-2016mar16-htmlstory.html (summary of CPRA requests made to 107 agencies in San Diego County between January 2015 and March 2016); http://laschoolboard.org/sites/default/files/01-26-16PublicRecordsActRequests.pdf; (presentation by the Los Angeles Unified School District's General Counsel regarding requests received by the District in 2015; https://www.pausd.org/public-records-act-requests (log showing receipt of over 300 CPRA requests to the Palo Alto Unified School District since 2017); and, https://www.delmartimes.net/news/sd-cm-nc-sduhsd-publicrecords-20190125-story.html (description of 130 CPRA requests received by the San Dieguito Union High School District in 2017-18 school year).

explained that it had spent over $40,000 responding to CPRA requests in one school year.

By way of example, the following are actual CPRA requests received by school districts in San Diego County: "Docs on SRO's [School Resource Officers] and related items;" "Legal claims (dates, types of injury, description of incident) and payments for districts served by the JPA by fiscal year since January 2011;" and, "Bullying complaints."[7] In order to provide non-exempt records for each of these requests, education agency personnel must locate the materials and review each one to determine if they are disclosable under the CPRA. Then, education agency personnel must review each disclosable record to locate and extract any education record or information that alone or in combination with other information might allow for identification of an individual student. This goes well beyond a student's name, reaching information including involvement in school activities, class enrollment, or other descriptions or associations that together might allow a member of the public to identify the student. This requires an extra level of review (and additional cost) unique to agencies subject to FERPA and the Education Code.

[7] See https://www.sandiegouniontribune.com/news/watchdog/sdut-search-public-records-requests-2016mar16-htmlstory.html.

As requests shift from seeking hard copies to electronic records, this burden does not diminish.[8] That said, the ELA does not take the position that the CPRA cannot impose some financial burden on education agencies. Practically, every request will impose some burden that education agencies must bear. However, it is important to understand the scope of that burden, how it is increased by the need for education agencies to protect student privacy, and – perhaps, most importantly – how the Legislature decided to strike a balance between offsetting this burden for all agencies and the public's access to records.

## C. THROUGH SECTION 6253.9 THE LEGISLATURE BALANCED COMPETING INTERESTS & ALLOWED COST SHARING WITH EDUCATION AGENCIES IN A VARIETY OF CIRCUMSTANCES

The enactment of any public records disclosure requirement, like the CPRA, must necessarily confront the tensions inherent in such a requirement. (See e.g., *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 298 ["in defining personnel records [in the CPRA] the Legislature drew the line carefully,

[8] Respondent's Reply suggests that: "Paper records that are burdensome to redact may be far less burdensome to redact in electronic form." (Reply, p. 12.) However, there is no support provided for this assertion. Moreover, in many situations redacting electronic records can be more burdensome. For example, redacting electronic records can require specific hardware, software, or training and also require that the redactions include not only the information at issue, but the electronic meta-data associated with that information.

with due concern for the competing interests"].) The provisions of the CPRA, including those related to cost sharing, indicate a delicate balance struck by the Legislature.

Consequently, this Court has explained it "may not countermand the Legislature's intent" when applying the CPRA's provisions. (*Sierra Club, supra,* 57 Cal.4th at p. 166; *Copley Press, Inc., supra,* 39 Cal.4th at p. 1299 ["it is for the Legislature to weigh the competing policy considerations"].) If Respondent disagrees with the Legislature's policy decision, their arguments are appropriately heard in the State Capitol, not the courts.

### 1. The Plain Language Of Section 6253.9(b)(2) Supports The Court Of Appeal's Conclusion & Undercuts The Narrow Interpretation Urged By Respondent

Before this Court, Respondent's arguments strive to narrow the words of section 6253.9(b)(2) to the point that they are rendered meaningless, eliminating any cost sharing under the provision. Such a result should be avoided. (*People v. Kermit Vargas Cruz* (1996) 13 Cal.4th 764, 782.) Instead, the words of the provision, each of them, should be given meaning to allow for reasonable cost sharing between agencies and requesters.

Preliminarily, it should be noted that the plain language used by the Legislature is always the best evidence of the Legislature's intent for the application of the statute. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) While Respondent is correct that other context may be considered in

applying the words of the CPRA (Reply, p. 7); that context must remain secondary to the "plain and commonsense meaning" of the words forged by the legislative process. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616, 616-17.)

In this case, the Legislature ultimately selected language by which: "the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when … [t]he request would require data compilation, extraction, or programming to produce the record." Respondent reads "data compilation, extraction, or programming" to have a single meaning, to "take something out in order to produce or construct something else." (Reply, p. 16.) This construction, by which each term is defined by the other, violates canons of statutory construction, is inconsistent with the language itself, and leads to an unworkable standard.

As this Court has stated in the context of applying the CPRA, it must "giv[e] significance to every word." (*Sierra Club, supra*, 57 Cal.4th at p. 166.) Contrary to the Respondent's argument "data compilation" must have a separate meaning from "extraction" and "programming, "extraction" must have a separate meaning from "programming," and "programming" must have a separate meaning from "data compilation." (See Reply, p. 8 [asking "why the three critical terms in section 6253.9(b)(2) should not be

construed together and defined by one another"].) The Court cannot assume that three different words have the same meaning, as to do so would be to assume the Legislature's use of all three terms was an idol act. (*Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497.)

Building on its definition, Respondent provides the following example and explanation to illustrate its interpretation of the statute:

> For example, a highlights video, reducing a 42 minute public highschool [*sic*] basketball game to two minutes would likely require extraction. A police video showing a gunshot fired at a suspect taken from a longer video covering an entire incident would likely be an extraction. But removing exempt data from an existing video would be a 'redaction,' as that term is commonly understood. Removing exempt data from an existing video deletes the portions that are exempt by law.

(Reply, p. 17, footnote omitted.) Essentially, Respondent takes the view that there are two types of removal: removing part of a record to create another record for disclosure is "extraction"; removing part of a record to allow the remainder of the record to be disclosed is not "extraction," but rather "redaction." There are several problems with this rationale.

First, the example has to assume that the agency would be required to create the "extracted" "highlights video." Because Respondent has so narrowly defined the term "extraction," in trying to fashion a hypothetical to illustrate that it still has some meaning it invents a situation which could not occur under the CPRA. As noted above, the CPRA does not require an agency to "create" a record to respond to a CPRA request. (*Fredericks,*

*supra,* 233 Cal.App.4th at p. 227; *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1073-75.) The requested highlights video, cannot be an example of extraction under the CPRA because the agency would not be required to create the record in the first place.

Second, the comparison of the two videos also assumes that extraction must be limited to taking the lesser from the greater to create a smaller record. In other words, Respondent appears to argue that removing two minutes of highlights from the 42-minute video and disclosing those two minutes would be "extraction" within the meaning of section 6253.9(b)(2), but if 40 minutes of the video were exempt from disclosure under the CPRA, removal of those 40 minutes and disclosure of the remaining two minutes would be "redaction" falling outside of section 6253.9(b)(2). This would make the cost sharing provision dependent on how much of the original record was ultimately disclosed – which would be an unworkable standard for requesters and agencies alike.

Third, Respondent's approach does not fit the words of the statute. Respondent is arguing that section 6253.9(b)(2) only applies where there is exaction *of* the record or extraction *from* an existing record – in other words, where the disclosable information is taken out of or from an existing record, but not where information is removed from the existing record and the remainder of the existing record is disclosed. But subdivision (b)(2) is phrased broader, to apply where "extraction" is required "*to* produce the

record." This language fits the understanding that "redaction" is a subset of "extraction," in that it requires something to be removed from something else. Thus, where redaction, among other types of extraction, are required *to* produce a record from an existing record, subdivision (b)(2) applies.

Finally, Respondent notes that: "The Legislature never adopted or incorporated the term the objectors used 'redaction.'" (Reply, p. 22.) This is true. But it does not necessarily mean, as Respondent implies, that "redaction" is outside the scope of section 6253.9(b)(2). Instead the text of the statute, as well as the legislative history discussed below suggests the Legislature selected broader terms which encompassed a wide range of activities, described as compilation, extraction, and programming, that agencies would need to engage in – including "redaction" – when preparing electronic records for disclosure.

It may not be an accident that the Legislature used broader terms, and three separate terms, to describe these activities. Given the arguments in this case, it is easy to see how a more specific single term could have been twisted to narrow the scope of section 6253.9(b)(2). Moreover, as the Legislature would have been aware in 2000, the terms of the statute would need to apply to technology not contemplated at the time. Using broader, multiple terms is one way the Legislature could guard against technology outpacing the language of the statute.

### 2. The Decision Below Was The Third Time A California Appellate Court Gave 6253.9(b)(2) A Broader Application Than Urged By Respondent

While no California appellate court, outside the Court of Appeal's opinion below, has directly answered the question before this Court, two recent opinions also support a broader understanding of section 6253.9(b)(2) than the one urged by Respondent.

The first of those cases, *Fredericks, supra,* 233 Cal.App.4th 209, involved a CPRA request to a city and police department for complaints or requests for assistance pertaining to burglary or identity theft made within a 180 day period. (*Id*. at p. 216.) In remanding the case to the trial court for a determination as to the reasonableness of the request under section 6255, subdivision (a), the Fourth District Court of Appeal, Division One noted:

> As to additional or ancillary costs of production of electronic records, if the trial court decides on remand that more disclosures (e.g., over a greater time period) are consistent with the CPRA balancing process, but that they would require generation, **compilation and redaction of information from confidential electronic records, then section 6253.9, subdivision (b) may allow the court to condition disclosure upon an additional imposition of fees and costs, over and above the direct costs of duplication (§ 6253, subd. (b)).** Section 6253.9, subdivision (b) contemplates that the trial court will make a determination about the reasonableness of any fiscal burdens that would be placed on the Department from the requested disclosures.

(*Fredericks, supra,* 233 Cal.App.4th at p. 238, emphasis added.) Directly contrary to the position taken by Respondent, the Court of Appeal explicitly noted that the cost associated with "redaction" could be recoverable under

section 6253.9(b)(2). There is no way to read this passage other than to indicate the Court of Appeal's conclusion that the term "extraction" in 6253.9(b)(2) includes redactions.

The second case which suggests a similar understanding of section 6253.9(b)(2) is *Richard Sander v. Superior Court* (2018) 26 Cal.App.5th 651. *Sander* involved a request for information from the State Bar of California's bar admission database. (*Id*. at p. 655.) Specifically, the question posed to the First District Court of Appeal, Division Three, was whether the information could be disclosed without the need to create a new record to de-identify the data. In part, the Court of Appeal responded:

> No one disputes that public agencies can be required to gather and **segregate disclosable data from nondisclosable exempt information, and to that end perform data complication, extraction or computer programming if "necessary to produce a copy of the record."**

(*Sander, supra*, 26 Cal.App.5th at p. 669, emphasis added.) The Court of Appeal continued:

> There is no doubt that a government agency is required to produce non-exempt responsive computer records in the same manner as paper records and can be required to **compile, redact or omit information from an electronic record. (See e.g., §§ 6253.9,…)**

(*Sander, supra*, 26 Cal.App.5th at p. 669, emphasis added.) Again through these statements the Court of Appeal suggests a broad understanding of section 6253.9(b)(2) to incorporate the activities of segregating disclosable

data from nondisclosable exemption information or, more specifically, "redact[ing]."

While Respondent merely dismisses these passages as dicta or asks this Court to disapprove the statements, it does not explain why these holdings are incorrect or not persuasive in determining the meaning of section 6253.9(b)(2). These cases highlight the importance of the sharing of costs between requesters and agencies in determining when an agency is required to disclose a record. The reasoning and conclusions strongly support adoption of a broad understanding of section 6253.9(b)(2) which incorporates cost recovery for redaction of electronic records.

### 3. The Legislative History Supports An Interpretation Of Section 6253.9(b)(2) Consistent With The Court Of Appeal's Holding

Beyond the words of the statute and their recent interpretation by two Courts of Appeal, the legislative history of section 6253.9(b)(2) also suggests it should be given a broader read than urged by Respondent – specifically to include cost sharing for the cost associated with redaction of electronic records. The legislative history suggests that several concerns regarding costs were before, and considered by, the Legislature in refining the language that ultimately became section 6253.9.

As the Respondent admits in its reply, the Legislature never "address[ed] the meaning of the terms used in the language of the amendment – 'data compilation, extraction, or programming to produce the

record.'" (Reply, p. 27.) However, the legislative history is replete with descriptions of the concerns raised regarding cost sharing prior the addition of these terms in subdivision (b)(2).[9] These documents, many of them committee analyses, do not support Respondent's position. In fact, many of the historical documents specifically discuss the concerns regarding the costs associated with segregating disclosable records and redaction.

While the legislative history contains repetitive references to "segregation of records" and "redaction," there is no discussion of the term "extraction" or its origin. Respondent's theory appears to be that: (1) because the Legislature did not use the term "redaction" or "segregation" it rejected these concerns; and, (2) independently and without any explanation the Legislature added the term "extraction," but that term must mean something other than "redaction" or "segregation." It would appear that a more reasonable understanding of the legislative history would be to view the insertion of the term "extraction" as encompassing "redaction," and, at least in part, satisfying the cost concerns raised by opponents of AB 2799. This understanding ties together the concerns in the legislative history, the amendments of AB 2799, and the lack of a discussion about the meaning of the term of "extraction" in the legislative history. Ultimately, this

[9] See May 23, 2000 Assembly Floor Analysis of AB 2799, May 8, 2000 Assembly Government Organization Analysis of AB 2799, and Senate Judiciary Committee Analysis of AB 2799.

understanding of the legislative history along with the text of the statute and its interpretation by Courts of Appeal supports the application of section 6253.9(b)(2) adopted by the Court of Appeal below.

## D. SHARING OF SOME COSTS ASSOCIATED WITH DISCLOSURE OF ELECTRONIC RECORDS DOES NOT ELIMINATE ACCESS TO RECORDS OF EDUCATION AGENCIES

Much of Respondent's argument focuses on the policy implications of the statute's application. Respondent argues that adopting the Court of Appeal's conclusion will result in increased costs to requesters, therefore less access to public records, and therefore its holding must be incorrect. There are at least two problems with this rationale. First, the Court of Appeal's conclusion would not necessarily result in less access to public records, and second, even if there is some impact on those who can afford to access records that alone does not dictate the result of the dispute.

### 1. Cost Sharing Could Lead To Broader & Expedited Access To Records

As Respondent admits in its reply, recent California court cases have held that the financial burden imposed on an agency in responding to a request is a factor to be considered in determining whether an agency is required to respond to CPRA request. (*Bertoli, supra,* 233 Cal.App.4th at p. 372.) However, where a requester shares the cost with a public agency, the financial burden on an agency is lessened making it less likely that the burden will exempt the records from disclosure

For example, *Bertoli* involved a request that the trial court characterized as "unfocused and nonspecific, unduly burdensome, and an alarming invasion of privacy rights." (*Id.* at p. 355.) The Court of Appeal explained that:

> Pursuant to subdivision (a) of section 6255, disclosure of otherwise responsive public records may be blocked as overly burdensome if " 'on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.' " (*ACLU, supra*, 32 Cal.3d at p. 452, [].) When weighing the benefits and costs of disclosure, any expense or inconvenience to the public agency may properly be considered. (*ACLU, supra*, 32 Cal.3d at pp. 452–453, [].) And, in fact, in this case, the trial court "carefully weighed the competing interests at stake," including the potential financial impact on the City, before denying the Petition.

(*Bertoli, supra*, 233 Cal.App.4 at p. 372, as cited by *City of San Jose, supra,* 2 Cal.5th at p. 627.)

*Fredericks* expanded this reasoning to specifically suggest that cost sharing would narrow the grounds under which an otherwise overburdensome request could be rejected under section 6255. In directing the remand, the Court of Appeal noted:

> Specifically, the parties should be allowed to address the factors relevant to the balancing approach of section 6255, subdivision (a),…
>
> As to additional or ancillary costs of production of electronic records, if the trial court decides on remand that more disclosures (e.g., over a greater time period) are consistent with the CPRA balancing process, but that they would require generation, compilation and redaction of information from confidential electronic records, then section 6253.9,

> subdivision (b) may allow the court to condition disclosure upon an additional imposition of fees and costs, over and above the direct costs of duplication (§ 6253, subd. (b))….
>
> The petition for writ of mandate is granted with directions to the trial court to allow such further procedures as will identify the disclosable records within the balancing standards of section 6255, while recognizing that section 6254, subdivision (f)(2) lacks any express time limitation on disclosures. The trial court should reconsider Fredericks' request and the scope of any required disclosures as they are affected by the costs of compliance, based on all the relevant CPRA public interest balancing and policy factors.

(*Fredericks*, supra, 233 Cal.App.4th at p. 238.) In other words, the ability of the agency to share costs under section 6253.9(b)(2) could offset the financial burden on the agency resulting in the public's interest tipping in favor of disclosure. In this way, sharing of costs brings more requests within the scope of the CPRA – ultimately leading to broader disclosure of public records.

Beyond impacting the legal analysis as to whether a request is within the scope of the CPRA, cost sharing could also lead to faster access to requested records – especially as to records requested from education agencies. There is little argument that funding for education agencies, specifically school districts, is inadequate to support the core mission of school districts – educating students. (*Campaign for Quality Education v. State of California* (2016) 246 Cal.App.4th 896.) Thus, where requesters share in the cost of producing electronic records education agencies can supplement their normal workforce specifically in order to respond to

CPRA requests. In this way, ultimately, cost sharing could lead to more timely disclosure of electronic records.

**2. The CPRA Does Not Require Free Access To Records**

The CPRA does not guarantee access to public records without charge. Respondent is incorrect to claim that: "Passing the cost on to a requester is inconsistent with the scheme of the Act." (Reply, p. 13.) The concepts of access to records and cost sharing are not irreconcilable as suggested by Respondent. (Reply, p. 35.) Its argument ignores that several provisions of the CPRA specifically allow for requesters to share in the cost of disclosing public records – including section 6253.9. (See §§ 6253, subd. (b) & 6253.9, subd. (a)(2).) Thus, Respondent cannot argue that *any* increase in costs for access to records must be turned back in light of the purpose of the CPRA. In short, the answer to Respondent's question is the two can be reconciled by realizing that section 6253.9(b)(2) is a policy decision made by the Legislature to balance what are otherwise two opposing interests.

It may very well be that requiring requesters to bear some of the costs associated with the disclosing records lessens access to public records, but this is a policy decision made by the Legislature in enacting provisions that allow for cost recovery. In fact, if the Legislature believed that free access was of ultimate importance, there is no reason it would have enacted section 6253.9(b) at all. The question presented by this case

is not an all or nothing choice between disclosure or cost sharing, but a matter of understanding how the Legislature balanced the two interests. In this case that balance is expressed by the plain language of section 6253.9(b)(2) and its allowance for sharing of costs associated with extraction, including redaction, of information as part of the process to produce a record for disclosure under the CRPA.

## IV. CONCLUSION

Based on the foregoing, Amicus Curiae urges this Court to affirm the holding of the Court of Appeal.

DATED: May 31, 2019

DANNIS WOLIVER KELLY
SUE ANN SALMON EVANS
WILLIAM B. TUNICK
JENNIFER H. CHOI

By: /s/ William B. Tunick

Attorneys for Education Legal Alliance of The California School Boards Association

## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c) of the California Rules of Court, this Amicus Curiae Brief Of The Education Legal Alliance Of The California School Boards Association In Support Of Defendants And Appellants City of Hayward, et al. was produced using 13-point Roman type including footnotes and contains approximately 6,887 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: May 31, 2019

DANNIS WOLIVER KELLY
SUE ANN SALMON EVANS
WILLIAM B. TUNICK
JENNIFER H. CHOI

By: /s/ William B. Tunick

Attorneys for Education Legal Alliance of The California School Boards Association

## PROOF OF SERVICE

STATE OF CALIFORNIA )
) ss.
COUNTY OF SAN FRANCISCO )

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 275 Battery Street, Suite 1150, San Francisco, CA 94111.

On the date set forth below I served the foregoing document described as

**APPLICATION OF AMICUS CURIAE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS AND APPELLANTS CITY OF HAYWARD, ET AL. AND PROPOSED AMICUS CURIAE BRIEF**

on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

**SEE ATTACHED SERVICE LIST**

☒ **(VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at Long Beach, California with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

☐ **(VIA OVERNIGHT MAIL)** I caused such envelope to be deposited at an authorized "drop off" box on that same day with delivery fees fully provided for at 275 Battery Street, Suite 1150, San Francisco, CA 94111, in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing May 31, 2019 at San Francisco, California.

A'ree Hewitt

**Service List**

| | |
|---|---|
| Amitai Schwartz<br>Law Offices of Amitai Schwartz<br>2000 Powell Street, Suite 1286<br>Emeryville, CA 94608<br>Email: Amitai@schwartzlaw.com | Attorneys for Plaintiff and Respondent National Lawyers Guild, San Francisco Bay Area Chapter |
| Alan Schlosser<br>American Civil Liberties Union Foundation of Northern California, Inc.<br>39 Drumm Street<br>San Francisco, CA 94111<br>Email: Aschlosser@aclunc.org | Attorneys for Plaintiff and Respondent National Lawyers Guild, San Francisco Bay Area Chapter |
| Michael Lawson, City Attorney<br>Justin Nishioka, Deputy City Attorney<br>City of Hayward<br>777 B Street<br>Hayward, CA 94541<br>Tel: (510) 583-4458<br>Fax: (510) 583-3660<br>Email: Justin.Nishioka@hayward-ca.gov | Attorneys for Defendants and Respondents City of Hayward, Adam Perez, and Diane Urban |